



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
WASHINGTON, DC 20207

Record of Commission Action  
Commissioners Voting by Ballot\*

Commissioners Voting: Chairman Hal Stratton  
Commissioner Thomas H. Moore  
Commissioner Mary Sheila Gall

ITEM:

In the Matter of Daisy Manufacturing Company (CPSC Docket No. 02-2) –  
New Proposed Offer of Settlement by Daisy Manufacturing Company  
(Briefing package dated November 13, 2003, OS No. 3596)

DECISION:

The Commission voted (2-1, Commissioner Moore dissenting) to accept the proposed Offer of Settlement with specific changes to the Order and direct the General Counsel to draft an appropriate Order. Daisy Manufacturing Company submitted the Settlement Proposal for CPSC Docket No. 02-2, In the Matter of Daisy Manufacturing Company, on November 5, 2003 and amended it on November 10, 2003.

Chairman Stratton and Commissioners Gall and Moore each issued a statement with their votes. The statements are attached.

For the Commission:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson", is written over the text "For the Commission:". Below the signature, the name "Todd A. Stevenson" and the title "Secretary" are printed.

Todd A. Stevenson  
Secretary

\* Ballot vote due November 14, 2003



## U.S. CONSUMER PRODUCT SAFETY COMMISSION

### STATEMENT OF CHAIRMAN HAL STRATTON REGARDING THE *CPSC V. DAISY MANUFACTURING CO.*, CPSC DOCKET No. 02-02.

#### I. Introduction

This matter now comes before the U.S. Consumer Product Safety Commission ("Commission") on a revised settlement offer made by Daisy Manufacturing Co. ("Daisy") to the Commission on November 5, 2003. An original settlement offer was transmitted to the Commission via the administrative law judge ("ALJ") on May 14, 2003, which was denied by the Commission by a vote of two to one.

Upon receipt of the original settlement offer from the ALJ on May 14, 2003, I found, as a Commissioner who was not present prior to sending this case to the ALJ for adjudication, that I had very little access to the facts and evidence of the case necessary to make an informed decision as to the settlement offer.<sup>1</sup> I then requested that the parties waive the *ex parte* prohibition preventing Commissioners from discussing the case with either Daisy or complaint counsel.<sup>2</sup> This request was rejected by Daisy.<sup>3</sup> Under those circumstances, I voted not to accept the original settlement offer on September 15, 2003, as I did not feel I had, nor could I legally obtain, the requisite knowledge necessary to make an informed decision as to the settlement offer made by Daisy.<sup>4</sup>

Subsequently on October 14, 2003, Daisy submitted a motion to reconsider the previous settlement offer based primarily on Daisy's financial condition and their reported inability to obtain liability insurance at any reasonable price. Daisy alleges their "precarious financial condition" is a direct result of this action.<sup>5</sup> Upon receipt of this request, I once again asked the parties to waive the *ex parte* prohibition and allow the Commissioners to learn the facts and evidence of the case necessary to make an informed decision regarding the settlement offer. This time, both parties agreed to the *ex parte* waiver request.

My staff and I then met independently with Daisy and complaint counsel to learn the details of the case. We asked each side to give us their best evidence and to objectively evaluate the case for us. We assume the parties complied with this request in our meetings.

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<sup>1</sup> The case was initiated on October 30, 2001 by a 2-1 vote of the Commission. The ALJ was appointed in this case on February 7, 2002.

<sup>2</sup> The Commission is prohibited from contacting either party after the matter has been referred to the ALJ by certain provisions of the Administrative Procedures Act, 5 U.S.C. §§ 554, 557, and CPSC regulations, 16 CFR § 1025.68, as the Commission would eventually hear any appeal of the ALJ's decision in the case.

<sup>3</sup> It is my belief that had Daisy agreed to the request, this matter could have been resolved some time ago.

<sup>4</sup> As it turns out, there was apparently another earlier settlement offer made by Daisy which the ALJ did not see fit to transmit to the Commission.

<sup>5</sup> October 14, 2003, motion by Daisy counsel for reconsideration of proposed settlement offer, page two.

We have had additional conversations with each party to clarify certain points and have had the opportunity to review all the supporting documentation in the case.

Although I consider this administrative legal proceeding to be burdensome and inefficient, it was my original intent to let the matter proceed through the process and deal with the case if it came back to the Commission on appeal. However, the settlement offer and party's eventual agreement to present the evidence on both sides to the Commission, caused me to fully review the facts and evidence of the case. Since I am now familiar with all the relevant facts and evidence in the case--evidence that would be adduced at the administrative hearing in the matter-- it seems unnecessary and particularly inefficient to allow this case to go through what would be years of costly litigation from which we will learn nothing new. Under the circumstances, I have decided to accept the latest, revised settlement offer proffered by Daisy. I have made this decision based on the following reasons:

1. Based upon the evidence adduced in the case, I am not at all sure the CPSC complaint counsel would prevail on the merits of the case. Should the complaint counsel fail in their efforts to prove their case, consumers would obtain no benefit from a long and costly legal proceeding. The settlement, on the other hand, affords consumers a number of benefits that are enumerated therein and will be put in place immediately.<sup>6</sup>

2. I am concerned about the animosity on the part of all the parties in this case which I consider to be particularly rancorous. I would add that this rancor seems to go even to the attitude of the ALJ.<sup>7</sup> This type of attitude, although now all too common in litigation, causes the process to be much more expensive than necessary and particularly inefficient. It also causes the parties to be excessively adversarial to the point that litigation decisions could potentially be made for reasons other than trying to reach a just and amicable resolution of the case. As it stands now, if Daisy would remain solvent, this litigation could go on for years. Since all of the Commissioners now have access to and now know all of the relevant facts and evidence in the case, it would seem particularly imprudent to let the parties and the ALJ go on fighting for years in a case that would develop no further evidence or facts. A settlement not only resolves the litigation but also results in immediate benefits to consumers. In addition, the CPSC can better use its limited resources in making the market a safer place for consumers by amicably resolving this case now.

3. Although I don't consider it determinative in itself, I have also taken Daisy's financial condition into consideration. From a review of the extensive financial documentation that we requested and received from Daisy, it is clear that Daisy is in a "precarious financial" condition as alleged. It is less clear to me the role this proceeding has played in Daisy's financial condition. I believe the CPSC action may now be a factor in Daisy's financial condition, but I do not believe it is the only factor. Nevertheless, when considered with the other reasons to settle this matter, a settlement would provide certain immediate benefits to consumers, which they would not receive if Daisy becomes insolvent or this litigation drags on for years.

It is for these reasons, as more fully developed below, that I have voted to accept the revised settlement offer.

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<sup>6</sup> Appendix "A" is attached hereto which includes the major points of the settlement agreement.

<sup>7</sup> See letter of ALJ transmitting offer of settlement dated May 12, 2003.

## II. Background

This case involves two models of multi pump,<sup>8</sup> gravity feed<sup>9</sup> air guns produced by Daisy – the Model 880 and Model 856.<sup>10</sup> Complaint counsel alleges that the air guns represent a substantial product hazard in violation of § 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. §2064 and a substantial risk to children under §15 of the Federal Hazardous Substances Act (FHSA) 15 U.S.C. § 1274.

### A. Prior CPSC Actions Concerning BB Guns

Before this case was filed, CPSC dealt with air rifles on numerous occasions, through petitions and investigations. On four separate occasions, the Commission has been asked to regulate air guns.<sup>11</sup> Throughout its 30-year history, the Commission consistently found that regulating this product would not enhance safety.<sup>12</sup> Rather, the Commission has continuously made the determination to work with voluntary standards organizations to improve the safety standards of these products.<sup>13</sup>

Prior to the investigation that led to the filing of this case, the Commission investigated air guns seven separate times, utilizing a variety of disciplines, including engineering and human factors. With the exception of the investigation leading to this case, none of the investigations resulted in a preliminary determination that the product represented a substantial product hazard. In addition, these investigations showed that the air guns met existing voluntary standards.<sup>14</sup> The Commission has never found that air rifles, or any model of air rifle, constitute a substantial product hazard.

<sup>8</sup> A multi pump air gun uses air to propel a BB. The speed at which the BB is propelled increases when the gun is pumped more than one time.

<sup>9</sup> A gravity feed air gun uses gravity to position BBs into firing position when the air gun is loaded.

<sup>10</sup> As originally designed, the two air guns fired BBs and pellets at speeds up to about 650 fps, depending upon the amount of times the air gun was pumped. (The 856 was later redesigned, and is now a pellet only air gun.) Approximately 9 million of the air guns have been sold since 1972. The air guns are marketed, along with other high velocity air guns, under the description, "Powerline." Daisy's web site notes that the air guns are intended for users who are age 16 and older. Lower powered air guns (guns that shoot BBs at 350 fps or less), as marketed as under the description "Youthline".

<sup>11</sup> "Petition from the Western Massachusetts Public Interest Research", HP-74-5 (Dec. 17, 1973); "Petition from Kenneth J. Jacoby" HP 75-21 (May 23, 1975); Petition of The Children's Memorial Hospital, October 31, 1984; and Petition of the Education Fund, April 24, 1989.

<sup>12</sup> See, e.g., Letter, Sade E. Dunn to Stephen Rider, November 16, 1981 and minutes of Commission meeting, September 24, 1981.

<sup>13</sup> The most significant voluntary standards relating to air rifles are published by the American Society for Testing and Materials (ASTM), a voluntary organization of over 30,000 individuals from over 100 countries. ASTM produces standards for a wide variety of products, which standards serve as guidance for government, industry, and consumer advocacy groups. The relevant ASTM standards for air guns are F 589-92, "Standard Consumer Safety Specification for Non-Powder Guns", and F590-92, "Standard Consumer Safety Specification for Non-Powder Gun Projectiles and Propellants".

<sup>14</sup> These standards included ASTM Standard F 589 9.1.4.5-5 which provides that an air gun should be able to fire 100 projectiles without an accidental firing or failure to fire.

## B. Analysis of Facts

Over the course of considering Daisy's settlement offer, and after the *ex parte* waiver, my office has had the opportunity to be briefed by both complaint counsel and Daisy on the issues involved in this case, and to examine documents including depositions, experts' reports, and summaries of the evidence prepared by the parties. In the light of the information presented during reconsideration, several facts have become apparent:

1. The failure of air guns, particularly gravity fed air guns, to properly load, feed, and fire a BB may happen for a variety of reasons, and may not be limited to the particular models involved in this litigation.
2. Loading, feeding, and firing problems may not be best addressed by singling out a particular air gun or air guns for a corrective action, but by submitting these issues to the appropriate ASTM Subcommittee for the development of voluntary standards.<sup>15</sup>
3. Even though BB lodging may occur, the link between lodging and injuries is not at all clear. Complaint counsel has identified eight injuries, and one fatality, which are alleged to be due to BBs lodging in the Model 856. These injuries occurred over the course of 20 years of production and the sale of over 2 million units. Similar injury rates exist for the Model 880, which has been in production for 32 years with sales of 7 million units. It is apparent that if BB lodging injuries occur, they are relatively rare,<sup>16</sup> which goes to the issue of whether the defects alleged in the complaint, as a legal matter, constitute a substantial product hazard.
4. All of the injuries that can be attributed to the guns at issue in this case were preventable. They all involved either someone pointing the gun at someone and pulling the trigger or playing with the gun in an inappropriate manner—all in violation of widely known and accepted safety rules for the use of guns.

## III. Revised Settlement Offer

In my view, Daisy's revised settlement offer provides a framework to adequately address these concerns. Daisy has agreed to add warnings related to the hazards associated with these air guns, including misfeeding and failure to load BBs as part of its \$1.5 million safety campaign. All BBs manufactured by Daisy will contain a label or insert on the

<sup>15</sup> ASTM Subcommittee F15-06 deals with non-powder guns, and is the appropriate ASTM subcommittee in this situation.

<sup>16</sup> An examination of the types of injuries is also revealing. Eight of the injuries involved some form of eye trauma. This is a type of injury that may occur regardless of the model of BB gun used, though the severity of the injury might be less if a lower velocity air gun were involved.

package, which will be apparent to all users accessing BBs. The label or insert will warn consumers:

**WARNING:** 1) Always point the gun in a safe direction; (2) Always treat every gun as if it were loaded; (3) Any gun may fail to load, feed or fire a BB for a variety of reasons. Even if the gun fails to fire a BB one or more times, do not assume it is unloaded; (4) A BB can seriously injure or kill you or other humans if it is fired in an unsafe direction; (5) Shoot safely.

In addition, the revised settlement offer will submit performance issues to the appropriate ASTM committee for the purpose of developing standards related to the propensity of air guns to fail to load, feed or fire BBs. I believe this is a particularly important aspect of the settlement agreement as it submits the alleged problem to experts who can deliberately review the situation and, if necessary, adopt a safety standard to resolve it. Finally, the revised settlement offer will submit the issue of age appropriateness for air guns that fire projectiles in excess of 350 feet per second to the appropriate ASTM standards committee.

This litigation has been particularly contentious in my opinion. Given the deeply held feelings on both sides, it is probable that this case would stretch out for years assuming Daisy's solvency. I do not believe that continuing such litigation is in the public interest, particularly where a settlement has been offered that provides an immediate improvement in public safety for all air rifle users, not just the users of two specific models.

Given the numerous issues contested in the case, the litigation risks, and the benefit to the public resulting from Daisy's notice campaign and the submission of certain issues to the appropriate voluntary standards committee, I believe that the settlement agreement is in the best interests of consumers.



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
WASHINGTON, DC 20207

**STATEMENT OF THE HONORABLE MARY SHEILA GALL  
ON PROPOSED CONSENT AGREEMENT AND  
ORDER SUBMITTED BY DAISY**

November 14, 2003

I voted to approve the proposed Consent Agreement and Order ("the Settlement Offer") submitted by Daisy Manufacturing Company ("Daisy") on November 5, 2003, to settle CPSC Docket No: 02-2, *In the matter of Daisy Manufacturing Company*, because it is in the public interest and represents an adequate resolution of this case. This case remains, however, one that should never have been brought and a case that should have been settled much earlier. The Commission's actions have done serious and unjustified damage to the reputation and business prospects of a company whose product represents no substantial product hazard.

**OVERVIEW**

I opposed the filing of this case when it was presented to the Commission approximately two years ago and issued a public statement setting forth my reasons.<sup>1</sup> Since that time, Complaint Counsel and Daisy have developed their cases through discovery and pre-trial motions. In May of this year, the Presiding Officer transmitted a settlement offer from Daisy.<sup>2</sup> The Commission voted to refer the case to mediation, but the mediator was unable to induce the parties to resolve the case. The Commission then voted to reject the Daisy settlement offer. I dissented. Daisy asked the Commission to reconsider its decision and both Daisy and Complaint Counsel waived the ordinary *ex parte* regulations that govern communications to the Commissioners while a case is pending before a Presiding Officer. Based on my meetings with Complaint Counsel and Daisy, and on other materials in the record, I have concluded:

1. There is very little credible evidence that the Model 856 or Model 880 air rifles, in either their present or past configurations, represent a "substantial product hazard" within the meaning of Section 15(a) of the Consumer Product Safety Act

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<sup>1</sup> "Statement of the Honorable Mary Sheila Gall in Opposition to Issuance of Administrative Complaint Against Daisy Manufacturing Company," attachment to Commission Press Release #02-029, "CPSC Files Lawsuit Against Daisy Manufacturing Co. To Recall Two Models of Daisy's Powerline Airguns Due to Defects," October 30, 2001.

<sup>2</sup> Although this Daisy settlement made in May 2003 was the first settlement offer transmitted by the Presiding Officer to the Commission, it was, in fact, the third settlement offer that Daisy had made. The Presiding Officer decided not to transmit Daisy's first settlement offer to the Commission for its consideration. Daisy withdrew the second settlement offer and submitted the May settlement offer about two weeks later. The settlement offer submitted on November 5, 2003 and presently before the Commission is a modification of the May settlement offer.

(CPSA), or constitute a "banned hazardous substance" within the meaning of Section 2(q) (1) of the Federal Hazardous Substances Act (FHSA).<sup>3</sup>

2. The Settlement Offer submitted by Daisy will materially improve the safety of shooters using Model 856 and Model 880 air rifles, air guns in general, and even firearms. Approval of the Daisy Settlement Offer is, therefore, in the public interest both because it resolves this case and because it will improve the safety of shooters.

## **THE DAISY MODEL 856 AND 880 AIR RIFLES ARE NOT SUBSTANTIAL PRODUCT HAZARDS**

### Allegations and Theories of Defect and of Substantial Product Hazard

The Complaint as filed contained allegations that the Model 856 and 880 air rifles were substantial product hazards on a number of grounds: (1) BBs lodging in the magazine; (2) the lack of an automatic safety; (3) the color of the feed ramp; (4) the capability to mount a telescopic sight, which restricts visibility into the loading port; and (5) Daisy's marketing practices. After discovery, the case of Complaint Counsel had devolved essentially to the allegations concerning BBs lodging in the magazine, and the lack of an automatic safety. But even these allegations do not persuade me that these air rifles constitute a substantial product hazard.

### Analysis

#### *Magazine Lodging*

The central feature in Complaint Counsel's case is the allegation that BBs lodge in the magazine of the Model 856 and 880 air rifles and remain there without the shooter being aware of their presence.<sup>4</sup> A shooter ought to be able to unload a BB gun with a reasonable assurance that nothing remains in the magazine. I concede, therefore, that a propensity of BBs to lodge in the magazine of a BB gun and remain there without the shooter's knowledge is an undesirable characteristic. But this Commission only has authority to require a manufacturer to conduct a recall when a product contains a "defect" that constitutes a "substantial product hazard."<sup>5</sup> It is unlikely that the magazine lodging characteristics of the Model 856 and the Model 880 rise even to the level of a defect and they certainly do not constitute a substantial product hazard.

#### *The Model 880*

The magazine lodging characteristics of the Model 880 are the easiest claims of Complaint Counsel to dispose of. Even Complaint Counsel's expert could induce lodging in the magazine of the Model 880 air rifle only by using BBs that were grossly out of specification in

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<sup>3</sup> For simplicity throughout the rest of this statement I will refer to the phrase "substantial product hazard" as including the phrase "banned hazardous substance."

<sup>4</sup> Magazines are desirable features in air rifles since they cut down on reloading time and eliminate the need to extract a tiny pellet or steel air rifle shot out of a pocket or container after every shot.

<sup>5</sup> CPSA §15(a).



their dimensions<sup>6</sup> or by loosening a screw in the receiver of the Model 880. The first example is simply irrelevant to the issue of a defect in the *gun*. If there are BBs that are so out of specification that they create a magazine-lodging problem, the Commission should consider whether the BBs themselves contain a defect that creates a substantial product hazard. But the existence of such BBs would not justify a finding of substantial product hazard in the rifles into which they were loaded.

Similarly, a laboratory modification to a gun in order to induce lodging is of interest only if the modification is reasonably likely to occur when such guns are in the hands of consumers. Even Complaint Counsel's expert concluded that the experiment in screw loosening that led to BB lodging in the laboratory was unlikely to occur in the hands of consumers. Therefore, like the issue of out-of-specification BBs, the laboratory example of BB lodging is simply irrelevant in the Commission's determination over whether the Model 880 is a substantial product hazard. Without evidence of BBs lodging in the magazine in a manner likely to be encountered by consumers, the Commission cannot find that this characteristic of the Model 880 constitutes a substantial product hazard.

### The Model 856

The situation is more complicated in the case of the Model 856. It does appear that even in-specification BBs can lodge in the magazine and that this lodging can occur in rifles in the hands of consumers. But there are aspects of this magazine lodging characteristic that lead me to conclude that it is not a substantial product hazard.

A lodged BB presents no hazard *in and of itself*. A hazard may be presented if the BB then moves from the magazine into the chamber, and the rifle is discharged at close range at another person. However, the BB can only move from the magazine to the chamber by normal loading movements on the part of the shooter; *there is no self-loading mechanism that moves the BB from the magazine to the chamber without any intervention on the part of the shooter*. During normal loading operations the shooter is able to see the BB as it moves from the magazine and into the loading port. Moreover, the shooter personally provides the propellant force for the discharge by repeatedly pumping the forend.<sup>7</sup> The shooter can be under no illusion that the air rifle is in a condition to be discharged. The shooter also has ample opportunity to observe whether a projectile has been placed in the chamber. Even if a shooter has failed to observe the loading of a BB and believes that pulling the trigger will result in a "dry fire," an injury will occur only if the shooter points the gun at another person at close range and pulls the trigger, an action violating every known rule of shooting safety and common sense. I am aware that some shooters involved in accidents claim that they looked and observed no BB in the loading port when they went through the loading procedure prior to accident. But how much credence should this Commission put in an assertion that a shooter carefully checked to make

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<sup>6</sup> The standards for BBs are set by ASTM Subcommittee F15.06 on Safety Standards for Nonpowder Gun Products and are Designation F590-92 (Reapproved 2000). The dimensional requirements are found in Section 4.1 and Tables 1 and 2. The BBs found to be out of dimensional specification were not manufactured by Daisy. Complaint Counsel made no representation and appears to have done no testing to determine whether the out-of-specification BBs would pose a lodging or other hazard in other Daisy BB guns, or in other manufacturers' BB guns.

<sup>7</sup> The shooter does not provide the propellant force in those versions of the Model 856 and 880 in which the propulsive force is provided by a CO2 cartridge. Complaint Counsel has not, however, sought to distinguish those versions of these rifles from the more common versions using air compressed by the action of the shooter.

certain that no BB was in the loading port, and then seconds later committed a grossly reckless act? An individual inclined to such gross recklessness is very unlikely to have observed with any care whatsoever whether a BB was moving into the loading port, let alone whether BBs were present in the magazine. Shooter recklessness, not BB lodging characteristics, is the cause of the alleged "lodging" accidents and associated injuries and deaths.

### *Use by Children and Youths*

Another important aspect of Complaint Counsel's case is that the Models 856 and 880 are higher-powered BB guns than the BB guns produced by Daisy prior to 1972. Low-velocity BB guns, such as the classic Daisy "Red Ryder" can injure people, but not nearly as badly as higher velocity air rifles. According to Complaint Counsel's theory, shooters who believe that they are using low velocity air rifles might be inclined to conduct that they would forego if they realized that the rifle was capable of inflicting considerable injury or even killing another person. Such conduct, also according to the theory, constitutes reasonably foreseeable abuse within the meaning of Section 2(s) of the FHSA. This theory is not, however, supported by the evidence.

Daisy introduced the Model 880 in 1972 and the Model 856 in 1984. Whatever surprise the shooting community might have experienced at the introduction of Daisy high-velocity air rifles has had ample opportunity to dissipate, and shooters have had well over a quarter century to adjust their behavior to the characteristics of the rifles that they hold in their hands. Whatever justification the "Daisy is and always has been associated with low-velocity air rifles," argument might have had in the early 1970s, it clearly has no merit now.

There is also a voluntary standard addressing how the packaging of air rifles capable of the velocities achieved by the Model 856 and Model 880 must be labeled.<sup>8</sup> The label required by that voluntary standard states clearly that the air rifle is for ages 16 years and older and is not a toy. It goes on to inform the prospective purchaser that adult supervision is required, misuse or careless use may cause serious injury or death and that the air rifle is dangerous to 333 yards (304 meters). Prospective purchasers who even glance at the label can be under little illusion that what they are buying has the capability to injure or kill a person.<sup>9</sup> While these age recommendations and the labeling required by the voluntary standard have changed over the years, Complaint Counsel does not allege that Daisy has failed to comply with whatever voluntary standard in force at the time that Daisy made and sold its rifles. In addition to the labeling required by the voluntary standard, some major retailers<sup>10</sup> have "bar-coded" these rifles so that they cannot be sold to persons less than 18 years old.

I recognize that packaging is usually discarded after the rifle is removed from it and will not, therefore, be available for perusal by subsequent users of the rifle. But even a subsequent

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<sup>8</sup> The voluntary standard for air rifles is set by Subcommittee F15.06 on Safety Standards for Nonpowder Gun Products and is Designation F589-00. The labeling requirements are set forth in Section 10.

<sup>9</sup> The Daisy settlement offer proposes to supplement the existing labeling with: (1) a "Take Aim at Safety" label to the face of all Daisy brand and Powerline brand long gun packages; (2) a tape band around Model 856 and 880 gun boxes which will include additional warnings; and (3) a hang tag, zip tie, or sticker that will be attached to the Model 856 and 880 guns themselves with an additional warning. As a part of its settlement offer, Daisy will also provide an insert or package label to all boxes of BBs containing warnings.

<sup>10</sup> Wal-Mart and K-Mart are two stores that Daisy asserts have such procedures in place.

user of a Model 856 or Model 880 is not likely to be confused between a Daisy low-velocity air rifle and either the Model 856 or the Model 880. I have prepared a chart that compares three aspects of the Model 856 and Model 880 with the Daisy Youthline model air rifles, and with some .22 rimfire and centerfire rifles and shotguns, and attached it to this Statement. The chart ranks the list of these rifles and shotguns in ascending order of "length of pull,"<sup>11</sup> which is probably the most relevant dimension in the sizing of a rifle or shotgun for younger shooters. I have also included the overall length and the weight of the rifle or shotgun. This chart shows that the Model 856 and Model 880 have dimensions that are more consistent with firearms than with the Daisy Youthline Model air rifles. It is, therefore, implausible to assert that these two model air rifles are "masquerading" as low-velocity air rifles.

Finally, this Commission must address issues of safety in air rifles in light of the fact that these model air rifles are *weapons*. The reckless abuse of a *weapon* is simply not a risk against which this Commission can reasonably ask manufacturers to guard. This type of risk is inherent in the nature of the instrument.<sup>12</sup> The Commission must rely on individual and parental responsibility in limiting the adverse consequences of BB gun use. One of the most important decisions that a parent will ever make is when to entrust a young person with a BB gun or a firearm without supervision, and one of the most consequential decisions any individual can make is to pull a trigger on BB gun or firearm. When tragedies happen with reasonably safe products such as the Model 856 and 880 air rifles, they result from the irresponsibility of the user, or poor parental and caregiver judgment, not the inherent nature of the instrument.

### *Daisy Marketing Practices*

Part of Complaint Counsel's case contains allegations that Daisy marketed the Model 856 and 880 for use by persons younger than the age recommended for high-velocity air rifles. Such claims are highly implausible in the light of Daisy's product line. Even if they are true, it is unlikely that Daisy marketing practices actually resulted in any use of its air rifles by persons younger than the recommended ages. Age recommendations for air rifles capable of certain velocities are governed by the voluntary standard and are displayed on the packaging.<sup>13</sup> At the present time, that age recommendation for air rifles capable of the muzzle velocities achieved by the Model 856 and the Model 880 is 16. Daisy has had age-appropriate recommendations on the packaging of its Model 880 rifles since 1973 and on the Model 856 rifle since it was introduced in 1984.

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<sup>11</sup> Length of pull is the distance between the front of the trigger and the back of the buttplate, which lies at the rear of the stock and is braced against the shoulder of the shooter when firing. The longer the length of pull, the longer a shooter's arms must be to hold the rifle or shotgun comfortably.

<sup>12</sup> Many states have adopted laws concerning the minimum age at which a person may purchase or possess a BB gun in the absence of supervision. For example, Delaware makes it unlawful for a person to transfer a BB or air gun to child under 16 unless that person has the permission of the minor's guardian. *Del. Code Ann. Tit. 11, 1445(2)(2000)*. New York makes it unlawful for a person under age sixteen to possess an airgun or spring gun. *N.Y. Penal Law 265.05 (McKinney 2001)*. Pennsylvania makes selling or transferring an air rifle to a person under 18 unlawful. *18 Pa. Cons. Stat. 6304(a)(2001)*. For a discussion of various U.S. state restrictions on BB gun possession and sales, see S.K. Presnell, "Comment: Federal Regulation of BB Guns: Aiming to Protect Our Children," 80 N.C.L.Rev 975, 1001, fn 162-173. (2002). Canada classifies high velocity air rifles as firearms. Firearms Act, Part III, §84(3)(d)(1995)

<sup>13</sup> ASTM F 589-00, §§10.1.1 and 10.2.6.

I find it highly implausible that Daisy would deliberately try to induce purchasers to buy Model 856 and 880 rifles for shooters who are younger than 16. In addition to its Powerline series of air rifles, of which the Model 856 and 880 are examples, Daisy offers a "Youthline" series of rifles, with an age recommendation of 10 and older.<sup>14</sup> Daisy's clear marketing scheme is to sell the Youthline Models for use by consumers between 10 and 16, and then sell the Powerline Models for use by consumers 16 years and older. To the extent that consumers purchase Powerline models for use by shooters younger than 16, Daisy is likely to have lost an opportunity to sell that consumer a Youthline Model. Daisy has no economic incentive to sell Model 856 and Model 880 air rifles for use by shooters younger than 16 and a considerable economic incentive to avoid such sales.

Even if Daisy engaged in the economically irrational practice of marketing Model 856 and Model 880 air rifles for use by shooters younger than 16, I doubt that it would have any measurable impact on sales. As I discussed in a previous section, the decision of when to permit a young person to be instructed in, and be permitted the unsupervised use of guns, whether air rifle or firearm, is one of the important and difficult decisions that parents or caregivers can make.<sup>15</sup> The marketing program of a single air rifle manufacturer is unlikely to make much difference to consumer attitudes about the appropriate ages at which young people should be introduced to guns and shooting, and the age at which they can be trusted with the unsupervised use of a high-velocity air rifle.

#### *Automatic Safeties*

Some air guns incorporate automatic safeties in their design.<sup>16</sup> The deposition testimony indicates that some designers and experts think such a feature is a good thing, and other, equally qualified designers and experts, believe that it is undesirable. *At most* an automatic safety might qualify as a "nice to have" feature. Its absence can hardly be termed to be a *defect*, especially when the voluntary standard covering BB guns contains specifications for the safety that include no requirement that it reset automatically.<sup>17</sup> As I said in my statement opposing the issuance of this complaint, the issue of automatic safeties is an industry-wide one, and should not be the subject of an action seeking to force the recall of two discrete products on that basis. For these reasons I conclude that the fact that the Daisy Model 880 and 856 contain no automatic safety is not a defect and certainly does not constitute a substantial product hazard.

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<sup>14</sup> The labeling requirements for such air rifles are governed by ASTM F 589-00 §§10.1.1 and 10.2.1.1.

<sup>15</sup> A poll conducted by *American Rifleman* magazine in May and June, 2003 showed that 83% of the respondents said that they had been introduced to shooting as "preteens." While I recognize that this is not a scientifically valid survey, it is an indication that parents frequently children younger than 13 to be instructed in shooting.

<sup>16</sup> By automatic safety I mean a mechanical device that interposes itself the "On" position after each shot, and which must be manually moved by the shooter to the "Off" position to discharge the rifle again.

<sup>17</sup> ASTM Designation F 589-00 recognizes the existence of automatic safeties (§3.1.2.17), but requires only that most non-powder guns have a "safety mechanism" (*id.* §§3.1.2.19 and 4.4.1). The test of the safety mechanism is set forth in *id.* §9.4. There is no requirement in such a test that the safety mechanism reset automatically after a shot is fired. Air guns classified as match precision guns, adult guns and training guns are exempt from the requirement to have any kind of safety mechanism. *Id.* §§4.4.1 and 8.

## **THE DAISY SETTLEMENT OFFER IS IN THE PUBLIC INTEREST AND RESOLVES THE CASE ADEQUATELY**

As the preceding portions of this statement have made clear, there is very little evidence that the Daisy Models 856 and 880 air rifles constitute substantial product hazards. The action has, however, been brought and Daisy and Complaint Counsel have prepared their cases for trial. Daisy has, moreover, made a settlement offer showing what it is prepared to do to resolve the case.

It is an axiom of jurisprudence that the law favors settlement of disputes. Prior to the transmission of the Daisy Settlement Offer, this matter had been set for a two-week trial in Washington DC and Arkansas. Trial of this matter will be very resource intensive for both the Commission and for Daisy. The Commission must be especially sensitive to the expenditure of resources, both because it spends taxpayer dollars, and because it must constantly balance its resources in light of the wide range of product hazards against which Congress has charged it to protect the public. For the reasons set forth below, I believe that it is in the public interest for the Commission to accept this Settlement Offer and end the case on those terms.

### **Technical Issues Generic to Air Guns**

The Daisy Settlement Offer proposes to refer to the voluntary standards setting process the two issues remaining in the case:

1. The appropriate age recommendations for airguns with a muzzle velocity exceeding 350 feet per second.
2. The possibility of a voluntary standard governing the loading and feeding of BBs.

These issues are neither unique to the Daisy 856 or 880 model air rifles, nor to Daisy air guns. Rather, they are industry-wide concerns appropriately resolved in the voluntary standards setting process. The pertinent subcommittees of ASTM Committee F15 have long experience in evaluating the nature of air rifles and developing standards that balance safety concerns with utility considerations. Commission staff have been consistent participants in that process. If the Commission finds that it is dissatisfied with the results of the voluntary standards setting process, it is always free to begin rulemaking proceedings that will apply to the entire industry.

### **Issues Specific to the Models 856 and 880 Air Rifles**

The Daisy Settlement Offer also deals with the magazine-lodging allegations of the complaint that are specific to the Models 856 and 880 air rifles. Daisy will continue to manufacture the Model 856 air rifle as a single-shot pellet gun. Since current and future production of the Model 856 will not have a magazine, there is no possibility that a BB will become lodged in the magazine. As I noted previously, there is no lodging problem associated with the Model 880 apart from the use of grossly out-of-specification BBs or laboratory experiments that have never been observed in field use of the air rifle. What little problem may exist in the magazine arrangement of the Model 880 will be addressed by Daisy's "Take Aim at

Safety" campaign, for the same reasons that it addresses whatever hazard may exist in the magazine arrangements of many Model 856 air rifles in the hands of consumers.

In the case of previously produced Model 856 air rifles, the record reveals that BBs appear to lodge in the magazine in field use, although as noted earlier, that tendency to lodge does not constitute a substantial product hazard. Nevertheless, the first three points of Daisy's "Take Aim at Safety" campaign address precisely the behavior that results in injury when a BB lodged in the magazine is inadvertently loaded into the chamber. If the muzzle is kept pointed in a safe direction and never allowed to point in the direction of a person, if the gun is treated as if were loaded (projectile in the chamber and propellant energy ready for discharge) and if guns were only loaded when shooting, no injuries would occur. I recognize that no information and education campaign is completely effective, and that not all shooters follow all rules of shooting safety all of the time. Nevertheless, Daisy's campaign will address whatever risk of injury may exist from the magazine characteristics of the Model 880 air rifle and previously-produced Model 856 air rifles now in the hands of consumers. Daisy's campaign, moreover, will assist in educating consumers using not only Daisy air rifles, but also consumers using other manufacturers' air guns, and even consumers using firearms. Hence the Daisy campaign will be far more effective in overall shooter and public safety than a program limited to one characteristic of one or two particular models of air rifle. It is in the public interest and I am pleased to vote to accept it.

#### **DISSATISFACTION WITH CASE AND COMMISSION PROCEDURES**

Although I am pleased to vote to accept the Daisy Settlement Offer and to end this case, I would be remiss if I did not express my extreme dissatisfaction with the way that this case was brought and the manner in which it has been conducted. In my nearly twelve years of service with this Commission, and indeed, in my over thirty years of government service, I have never seen a more outrageous miscarriage of justice and abuse of the processes of public policy than this case. The case was brought in 2001 in circumstances that I described in my dissent to the filing of the administrative complaint. Some of the deposition testimony given by Commission employees show clearly that the previous Chairman ordered that the case be removed from the ordinary processes of Commission staff review because she did not like the conclusions that the career staff were reaching about the hazards associated with the Model 856 and 880 air rifles.

But the unfairness to Daisy continued beyond the decision to commence the case. On September 9, 2002 Daisy sought to settle the case and transmitted the offer to the Presiding Officer for transmission to the Commission. Complaint Counsel opposed that transmission. The Presiding Officer, ignoring the clear statutory mandate to transmit settlement offers to the Commission,<sup>18</sup> elected not to transmit the offer. Daisy sought an interlocutory appeal of the Presiding Officer's decision, which Complaint Counsel also opposed, and which the Presiding Officer also denied. All of this effort kept the Commission from even considering Daisy's Settlement Offer.

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<sup>18</sup> In declining to transmit the first settlement offer the Presiding Officer ignored Section 15(f) of the CPSA: "Any settlement offer which is submitted to the presiding officer at a hearing under this subsection *shall be transmitted* by the officer to the Commission for its consideration *unless* the offer is clearly frivolous or is duplicative of offers previously made" (emphasis added).

On May 1, 2003 Daisy submitted another settlement offer to the Presiding Officer, which the Presiding Officer did transmit to the Commission.<sup>19</sup> The May settlement offer is very similar to the settlement offer upon which the Commission is voting today; it is seven pages long with a one-page attached order. Attachments consist of the Complaint, Daisy's Answer, and descriptions of Daisy's "Take Aim at Safety" information and education campaign. It took the Commission approximately four and a half months to reject this settlement offer (including the time for a failed effort at mediation) and it did so without stating why the offer was being rejected or indicating what might be an acceptable offer.<sup>20</sup> I dissented and voted to accept the settlement offer.

On October 1, 2003, Daisy asked this Commission to reconsider its decision rejecting the settlement offer, citing a financial situation that made it unlikely that Daisy could undertake any substantial corrective action program. Both Daisy and Complaint Counsel waived the Commission's *ex parte* communications restrictions and Daisy submitted the Settlement Offer that I am voting to accept. The record shows that this is a case that should not have been brought in the first place, and which has now been settled on terms substantially similar to those that Daisy proposed over fourteen months ago.<sup>21</sup> Students of government who wish to see how the regulatory enforcement process can be used to harass a small company to no good purpose need look no further than this action for a splendid case study. I hope that in the future, the Commission will take much greater care in deciding which actions to bring, and exercise greater oversight of pending actions, in its effort to protect the public from genuine product hazards.

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<sup>19</sup> Both Complaint Counsel and the Presiding Officer opposed the Commission's accepting the settlement offer. Complaint Counsel's position for withdrawing its opposition to transmitting the settlement offer to the Commission was that the Commission was "differently constituted" than when it voted to file the complaint and initiate the action. The Commission's membership is, however, exactly the same as it was when Complaint Counsel opposed the transmission of Daisy's first settlement offer in September 2002.

<sup>20</sup> I recognize that Daisy did not waive restrictions on *ex parte* communications in connection with the settlement offer transmitted to the Commission in May, despite a request that it do so. While the lack of the ability of the Commissioners to communicate with Daisy and Complaint Counsel on a *ex parte* basis may have hampered the Commission in its ability to assess the merits of the May settlement offer fully, there is no reason why it should have resulted in a delay.

<sup>21</sup> Daisy's first settlement offer was never transmitted to the Commission because of an interpretation of the Commission's adjudicative regulations dealing with Commissioner access to *in camera* materials (16 CFR §1025.45(c)(2000)) with which I do not agree.

<b>Firearm or Air Rifle</b>	<b>Length of Pull</b>	<b>Overall Length</b>	<b>Weight</b>	<b>Remarks</b>
Daisy 105 Youthline	10 3/4"	29 7/8"	1.6 lbs	Low-Velocity Air Rifle
Henry Repeating Arms				
Minibolt .22 rimfire	11 1/2"	30 1/4"	3.25 lbs	Intended for Children
H&R/NEF Topper				
Junior Shotgun	12 1/2 "	36"	5-6 lbs	Intended for Youths
Remington Model 7				
Youth Centerfire Rifle	12 1/2"	38 1/4"	6.5 lbs	Intended for Youths
Daisy 95 Youthline	12 3/4"	35 1/8"	2.4 lbs	Low-Velocity Air Rifle
Daisy 840 Youthline	12 3/4"	36 7/8"	2.25 lbs	Low-Velocity Air Rifle
Winchester Model 70				
Compact centerfire rifle	13"	39 1/2"	6 lbs	Intended for Youths
Winchester Ranger				
Compact shotgun	13"	44"	7 lbs	Intended for Youths
Daisy 856	13 3/8"	37 3/8"	2.7 lbs	High Velocity Air Rifle
Remington 7400				
Centerfire Rifle	13 3/8"	42 5/8"	7.5 lbs	Intended for Adults
Daisy 880	13 5/8"	37 5/8"	3.7 lbs	High Velocity Air Rifle
Daisy 1938 Red Ryder	13 5/8"	35 3/8"	2.2 lbs	Low-Velocity Air Rifle
Remington Model 597				
.22 rimfire	14"	40"	5.5 lbs	Intended for Adults





UNITED STATES  
CONSUMER PRODUCT SAFETY COMMISSION  
WASHINGTON, DC 20207

STATEMENT OF THE HONORABLE THOMAS H. MOORE IN THE MATTER OF DAISY  
MANUFACTURING COMPANY  
CPSC DOCKET NO. 02-02  
November 14, 2003

On May 12, 2003, the Administrative Law Judge (ALJ) in the Daisy case forwarded an Order Staying Proceedings and Transmitting Offer of Settlement (Offer) to the Commission. To facilitate Commission review of the Offer, the Office of the Secretary asked Daisy and Complaint Counsel if they would waive the rules against *ex parte* contact to allow the Commissioners to speak freely with them about the settlement proposal. Daisy refused this request. At that point the only possible options under our regulations were to vote to accept or deny the settlement offer based on the relevant pleadings of the parties. Under our rules, if the Commission voted to deny the settlement proposal it could give guidance to the parties as to the deficiencies of the Offer. 16 C.F.R. § 1025.26. Instead of doing this, a majority of the Commission decided to propose mediation to the parties as a means of resolving the lawsuit. A neutral mediator was chosen and the mediation was held, but it did not result in an agreement. Subsequently, on September 22, 2003, a majority of the Commission voted to reject the settlement offer, without elaboration, and returned the case to the judge for further proceedings.

Daisy next moved to recuse the judge by a Motion dated September 24, 2003. The judge rejected that motion and resumed his control of the proceedings. A majority of the Commission then voted to stay the proceedings pending a review of the Motion to Recuse and in order to review an additional Motion filed by Daisy on October 1, 2003 to Reconsider the previously rejected Proposed Settlement Offer. This latter motion was based on new information that Daisy wanted to proffer to the Commission about its financial condition.

Under our procedural rules, all settlement offers are to be transmitted to the judge, and, therefore, the Motion to Reconsider should have been addressed to him and not to the Commission. Indeed, contrary to our rules, the judge was never served with the Motion.<sup>1</sup> It was the judge's responsibility to decide whether to refer the same Offer of Settlement to the Commission that it had just rejected. However, a majority of the Commission voted to stay the proceedings in order to consider the Motion and to review the financial information provided by Daisy. I voted against the stay because, while it was appropriate for the Commission to stay the proceedings to review the recusal motion, the reconsideration motion was not properly before the Commission under our rules and we should not interfere with the Court's processing of it.<sup>2</sup> I also

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<sup>1</sup> Since the judge had no opportunity to do so and the Commission has also not issued an order to receive and preserve the Motion and related documents *in camera*, they are apparently freely accessible by the public to the extent no confidential treatment was claimed under our rules. 16 C.F.R. § 1025.45.

<sup>2</sup> Action on the recusal motion was informally delayed by a majority of the Commission. I supported this delay as that Motion could be rendered moot by action the Commission might take on the Motion for Reconsideration.

believed that the Commission's receiving this financial information, and trying to make a determination about it on its own, was inappropriate at this stage of the proceedings. Daisy's new issue of financial viability should have been brought before the judge, which would have allowed Complaint Counsel the opportunity to analyze the material and question Daisy and others about its validity. We should not allow this newly-raised financial issue to be used as a device to reconsider a settlement proposal already rejected by the Commission. There has been no ruling on Complaint Counsel's allegations that Daisy's Powerline BB guns are a substantial product hazard, in fact there has not even been a hearing. If a substantial product hazard is found to exist (after the various layers of review provided in our statutes and regulations have been exhausted) then a company's financial situation may be relevant in determining what level of corrective action it is capable of performing. If a substantial product hazard is not found, then no corrective action would be required. Our statutes do not put a company's finances above the public's safety.

Wanting to make its new financial argument directly to the Commission caused Daisy to drop its objections to *ex parte* communications between the parties and the Commissioners. Subsequently Daisy met with my two colleagues and provided them with financial information. My office received no contact from Daisy and no financial information from them.<sup>3</sup> Thus the only information before me is the pleadings of the parties. It is also my understanding that at the point where Complaint Counsel was offered an opportunity to review Daisy's financial information, Counsel would not have had time to do a proper review of it, so the Commission has been deprived of our staff's valuable input on this issue.<sup>4</sup>

Now representatives of the Commission have brokered a settlement agreement solely with Daisy, presumably on the basis of Daisy's private representations. This is completely outside of the agency's rules of practice. Those rules were adopted and published, after extensive public review through notice and comment rulemaking, so that every person appearing before the Commission would understand his or her procedural rights and could predict with a fair amount of certainty how the complaint would be processed. The rules establish a level judicial playing field both for outside parties and for the Commission's lawyers. They also serve to insulate the Commission from the proceedings so it can function without bias in its role as decision maker on appeals from the administrative law judge's rulings.

At least the first Commission-driven settlement attempt, while outside of our rules, was with a neutral, professional mediator. However, this latest activity where representatives of the Commission talked to only one side about the underlying merits of the Motion and negotiated their own alternate settlement agreement was clearly inappropriate.<sup>5</sup> Under our rules, an offer of settlement is to be transmitted to the Commission through the administrative law judge who

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<sup>3</sup> My colleagues did offer to provide me with the information they received from Daisy, but as Daisy, for whatever reason, did not provide me with the material directly, I declined their kind offers.

<sup>4</sup> In its Motion for Procedural Clarification, Complaint Counsel asked permission to file a brief responding to Daisy's Motion for Reconsideration. The Commission never responded to that request and thus was also denied the opportunity to hear Complaint Counsel's objections to that Motion.

<sup>5</sup> The General Counsel, in his September 5, 2003 memorandum to Commissioner Gall, noted a "significant" distinction between the Commission offering the suggestion of mediation as opposed to negotiating acceptable settlement terms. The General Counsel felt the former was acceptable but the latter constituted active involvement in the merits of the case, which raised issues in his mind (that he did not articulate).

screens it to make sure it contains the requirements of 16 C.F.R. § 1025.26(c) and also makes sure the offer, among other things, is not clearly frivolous or **duplicative of offers previously rejected by the Commission**. We followed our procedures (in that regard) on the Offer that the Commission rejected on September 22, 2003, but did not do so with the Offer submitted by Daisy's Motion to Reconsider or with the Commission-brokered proposal transmitted directly to the Commissioners by Daisy on November 5, 2003. As I stated in the context of the first mediation attempt, the Commission has two choices in dealing with a settlement proposal that has been referred to it by the ALJ. It can accept it or it can reject it. 16 C.F.R. § 1025.26. That these are the only two choices allowed by the Commission's Rules of Practice for Adjudicative Proceedings was made clear by the Commission when it reviewed the merits of a comment submitted during the rulemaking on the adoption of this section. The comment suggested that the Commission not restrict itself to just these two options, but give itself more flexibility. In response the Commission stated:

"The Commission views the section as drafted to be the preferred language. As a practical matter an offer can only be accepted or rejected. **It would be inappropriate and procedurally unwieldy for it to attempt to negotiate acceptable settlement terms with the respondents.** [Emphasis added.] In rejecting an offer of settlement, the Commission will endeavor to set forth its reasons and, where appropriate, indicate what modifications to the rejected offer would make it acceptable to the Commission. Thus, if a settlement offer is rejected, the party or parties offering the settlement may submit a revised offer, taking into consideration the reasons given in writing by the Commission for its having rejected the original offer."

I do not believe the Commission even has *those* choices on Offers that are not transmitted to it as directed by our Rules. Our only option in those cases is to refer the Offers to the administrative law judge for appropriate review under our Rules of Practice. These Rules have governed Commission adjudications for most of the Commission's existence and cannot be changed even by a vote of the Commission without first giving public notice of the proposed change and soliciting public comment. We cannot just decide to steer the parties to mediation or to accept a settlement offer directly from the parties or to broker private settlement agreements. If parties, including the Commission's Complaint Counsel cannot rely on the Commission to follow its own Rules of Practice, then chaos will reign.

The settlement agreement negotiated between Daisy and certain Commission representatives does not differ significantly in form or substance from the Settlement Offer that Complaint Counsel found unacceptable and that was rejected by the Commission in September 2003. It does not contain the major element sought by Complaint Counsel—a retroactive corrective action plan.<sup>6</sup> It is basically an information and education campaign on safe airgun handling. The campaign is not much different than the one Daisy already sponsors and has sponsored for a number of years. Why should we expect this campaign to work any better than

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<sup>6</sup> See page 3 of Complaint Counsel's Brief Regarding Respondent's Offer of Settlement, dated May 30, 2003: "As Respondent's counsel knows, the Compliance staff repeatedly indicated that it would not recommend the Commission's acceptance of Daisy's settlement offer unless it included an offer of corrective action to address the BB lodging defect."

the past one? Changing behavior through safety campaigns is difficult at best, which is why, whenever possible, a hazard should be designed out of a product to achieve real injury reduction. Many users of these guns, the users expected to pay attention to and to act upon the safety information, are children. And children will be children. They grow up pointing toy guns at each other. To expect them not to point BB guns at each other when they believe they are empty of BB's is to expect too much. In the incidents that would have been presented to the court in the administrative law proceeding, no one would have gotten hurt if the airguns had not unexpectedly had BB's in them, no matter where the airguns were pointed.<sup>7</sup> If children are led to believe the airguns are empty, but through some defect in the airguns they are not and other children are killed or seriously injured, then we need more than an information and education campaign. The settlement agreement now before us does not contain a corrective action plan with regard to airguns already in the hands of children. Under our Rules of Practice, a settlement agreement must contain a corrective action plan, as outlined in 16 C.F.R. § 1115.20(a). See 16 C.F.R. § 1025.26(c)(6). Now there will be no hearing that would have determined whether these airguns contain defects that present a substantial product hazard. Without benefit of a hearing and a reviewable record, the Commission is deciding, in effect, that no substantial product hazard exists. I, for one, am not comfortable with such a decision. While it is possible that I might have come to a conclusion similar to that of my fellow Commissioners after a review of a judge's decision and analysis of the hearing record, it is definitely not a conclusion I can come to now.

When our Rules of Practice were being adopted, some commenters wanted them to have less detailed requirements for the settlement proposal. In particular, some felt there should be no requirement for a corrective action plan in a settlement proposal. As I noted in my earlier statement on Daisy's original settlement offer, the Commission's response was:

"The comments suggested there be more "give and take" in the settlement process. The comments ignore the fact that in authorizing adjudication under these rules, the Commission is acting upon behalf of the public, and often to protect the public from exposure to a consumer product that allegedly presents a substantial product hazard or is dangerously flammable. The Commission staff, therefore, lacks the freedom to "give and take" in the same way as counsel for parties in private litigation. This is especially so in adjudications for an order under section 15 of the CPSA, 15 U.S.C. 2064, where issuance of an administrative complaint signifies that the Commission and the respondent were unable to arrive at a voluntary corrective action plan as provided for in 16 CFR 1115.20. **Permitting settlements that fail to meet the requirements for a voluntary corrective action plan will encourage individuals and firms to believe that they may be able to achieve more favorable terms after issuance of an administrative complaint. Such an expectation is unrealistic because authorization of a complaint means that the Commission has determined that the respondent's "best offer" for a voluntary corrective action plan did not meet the Commission's estimate of the minimum corrective action required to adequately protect the public. [Emphasis added.]** Since the Commission is concerned that matters in adjudication either be settled promptly and completely or else proceed through the judicial process in a timely manner, the

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<sup>7</sup> In addition to two deaths, these incidents have resulted in such serious injuries as eye loss, permanent brain damage and paralysis.

Commission will retain the provisions in § 1025.26(c) relating to the contents of settlement proposals.”

Only time will tell how much the Commission’s actions in this case will hamper our enforcement staff’s ability to negotiate voluntary corrective action plans in future pre-Complaint situations.

We are operating under section 15 of the CPSA in the Daisy matter. The Commission has already declared that Complaint Counsel’s role is not to settle for anything less than a corrective action plan that will protect the public from harm. Absent a determination on the issue of a substantial product hazard, I believe we have to make assumptions in favor of the public about the need for, and the contents of, a corrective action plan. Complaint Counsel does not have the traditional “give and take” ability to compromise a case for reasons other than protecting the public and the Commission should not do so based on allegations of financial harm to a company without first determining what degree of hazard the public faces from the products that company manufactures. THAT is our first order of business.

When the Commission authorized the filing of the Complaint against Daisy, it determined that Daisy’s best pre-Complaint offer did not adequately protect the public. The Commission voted just two months ago that Daisy’s most recent Offer also did not adequately protect the public. Now Daisy is back with basically the same Offer, through a different tactic and in the wrong forum. Quite apart from the procedural defects, the Offer must fail for the same reason that it failed last September—the plan does not do enough to protect the public from harm. Adding warning labels to boxes of BB’s does not change my assessment of the Offer.

Daisy’s Motion for Reconsideration and its Memorandum Brief in support of that Motion are not persuasive (assuming they are relevant at this stage of the proceedings). Daisy argues that the costs of litigation are contributing to its alleged precarious financial position. Every litigant in every case factors in the costs of litigation and weighs them against the costs of settlement. If we yield our position to this argument, we give up one of our prime bargaining chips in reaching settlements favorable to the public. Daisy also argues that an unfavorable Commission decision will result in more litigation against it, resulting in financial ruin. The number of cases filed against Daisy is a direct result of people being killed or injured by Daisy BB guns. That number will not increase because of anything the Commission does in this case. Daisy could save itself from many future lawsuits by agreeing to a strong retroactive corrective action plan. The one real positive step Daisy has taken in the last couple of years is to change the Model 856 Powerline airgun from a multi-shot BB gun to a one-shot pellet gun. Over time that action should reduce the incidents (and Daisy’s liability) from BB’s lodging in that gun. By taking the position that it is not going to worry about the multi-shot 856 airguns that are already in the hands of consumers, Daisy increases its own liability without any help from the Commission.

Daisy also argues that even if the Commission eventually wins and Daisy is compelled to do a corrective action, that the Commission will have won a Pyrrhic victory because Daisy will no longer be in business to be able to do any corrective action plan. This is certainly not the first time a company has raised this argument. Most of these dire predictions never come to pass. Daisy’s allegations about its finances need careful examination in the court proceeding. When

such allegations have come up in the past (usually in civil penalty cases) we have had outside experts, often from the Justice Department, review the company's finances to find out whether its allegations are accurate. As far as I know, this was not done in this case (a far more serious matter than a civil penalty case). Therefore I am unable to draw any conclusions about the state of Daisy's financial health. And I would not attempt to do so without expert guidance.

The bottom line is that we are not the Business Protection Agency; we are the Consumer Product Safety Commission. Our responsibility is to protect the public from dangerous consumer products. 15 U.S.C. § 2051(b). If we lose sight of that we will get entangled in endless discussions of company finances while consumers are being put at risk of death or serious injury. Our laws contemplate that companies must take responsibility for their unsafe products. In some cases that will mean taking responsibility both in the federal regulatory arena and in the civil court arena. Obviously we do not want our actions to drive a company out of business, and not just for the reason that Daisy threatens, that a defunct company cannot do a corrective action. However, it is a risk businesses face every day when they make products that have the capacity to kill and maim consumers.

Finally, there are problems with the proposed Consent Agreement and Order. Our Rules of Practice require the settlement offer to contain a statement that the allegations of the complaint are "resolved" by the Consent Agreement and Order. The latest proposed Agreement and Order uses the phrase "withdrawn and resolved." Since this phrase follows the much reduced list of items that Daisy is now offering to send to ASTM International for consideration in the voluntary standard arena, it appears that this is an attempt to put the Commission on record that those issues are no longer of concern to it.<sup>8</sup> That does not reflect my view. The Agreement omits the reference to a joint press release announcing the terms of the Consent Agreement and Order, a provision that was in the first Settlement Offer. Also, I do not believe the Commission has the authority to declare that the Consent Agreement can not be used as evidence in any state or federal court proceedings. Why would we want to restrict litigants from using an agreement that Daisy and a majority of the Commission have approved? The new proposal does include language on the BB boxes and additional language on the temporary hang tag, zip tie or sticker on the gun, as well as in the safety rules, to the effect that BB guns may appear to be empty when they are not. While this is a positive step, our Human Factors staff has not reviewed this language, so we have again denied ourselves the expertise of our in-house talent to evaluate the effectiveness of the language.

In summary, neither the Motion for Reconsideration nor the subsequent Offer of Settlement are properly before the Commission as they were not sent to the Administrative Law Judge as required by our Rules; it is inappropriate for the Commission (as opposed to Complaint Counsel) to negotiate deals with Daisy; Daisy's allegations as to its financial condition should have been examined in the court proceeding for their validity and their impact on any future corrective action plan that might have been ordered (or any settlement proposals Daisy may have made); failing an acceptable settlement offer, a judge should have been allowed to hear the case on the merits and render a decision which would have then come to the Commission for a review based on that record. For all of these reasons, I voted to reject the Proposed Settlement Offer.

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<sup>8</sup> Those issues are whether the velocity of airguns should be reduced and whether airguns should have automatic safeties. The omission of these issues is a serious weakening of the Offer the Commission rejected in September.